IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 107 OF 2004

Rekha Lakhi Totlani of Mumbai ... Petitioner
Indian Inhabitant, residing at
18, New Creation, 3rd floor,
5th floor, Khar (W),
Mumbai - 400 052.

V/s.

1. The Sind Brahma Sikhya Sammelan ... Respondent
   C/o. Kamla High School, Opp.
   Madhu Park, Khar (W),
   Mumbai - 400 052.

2. Kamla High School
   Khar (W), Mumbai - 400 052.
   (through the Head Master)

3. The State of Maharashtra
   (through the Secretary to the
   Govt. of Maharashtra, Education
   Department Schools, Mantralaya,
   Mumbai - 400 032.

4. The Educational Inspector
   Ismail Yusuf College Compound,
   Jogeshwari (East),
   Mumbai - 400 060.

5. I.R. Vazirani, Asstt. Teacher

6. E.A. Joseph

7. Neeta Punjabi

8. R. Rajendran

9. Rekha Sahani

   All working in Kamala High School
   Khar (West), Mumbai - 400 052.

Mr. M.M. Vashi for the petitioner.
Mr. Mohan Bir Singh for respondent Nos. 1,2 & 9.
Mrs. S.M. Dandekar, AGP for respondent No. 3 & 4.

CORAM : F.I. REBELLO &
ANOOP V. MOHTA,JJ.
DATED : 18th September, 2006

ORAL JUDGMENT [PER : F.I. REBELLO,J.]

. The petitioner has impugned the seniority list by which respondent Nos. 5, 6, 7 & 8 have been placed senior to the petitioner. The respondent No. 9 in fact is junior to the petitioner who stands at Sr. No.7 in the seniority list at Exh.A to the petition. The petitioner therefore, can have no grievance to the seniority of respondent No. 9.

. The petitioner was appointed as Assistant Teacher on 14.06.1976 and was possessing post graduate decree of M.Sc. The petitioner obtained diploma in higher education in the year 1980 and B.Ed. in the year 1991. It is the case of the petitioner that the respondent No. 5 to 8 joined after the petitioner and in these circumstances, they ought not to have been placed senior to the petitioner.

2. Rules have been framed under the provisions of the M.E.P.S. Regulation Act, 1977 which are known as Maharashtra Employees of Private Schools Rules, 1981 (hereinafter referred to as Rules).

. Rule 12 deals with seniority. It enjoins on the management to prepare a seniority list in accordance with the guide-lines laid down in Schedule "F". We are concerned with category "C" of Schedule "F". The method of determining interse seniority is set out therein.

. Respondent No. 5 joined the school on 11.06.1979 and acquired the teaching qualifications of B.Ed. on 28.05.1979. The respondent No. 6 joined the school on 16.05.1980 and had acquired the training qualification of B.Ed. on 24.08.1979. The respondent No. 7 joined the school on 27.07.1979, and had acquired the qualification of D.Ed. on 04.07.1975. In the chart at Exh. "A" it is shown that the said respondent has D.Ed. qualification and not B.Ed. It is also pointed out that the said candidate is likely to retire shortly. The respondent No. 8 Rajendran was appointed on 13.06.1986 and acquired B.Ed. qualifications on 31.05.1983. All these respondents in terms of Schedule "C" are senior to the petitioner having obtained the graduate teaching qualification prior to the petitioner in terms of the rules. The respondent Rajendran has since retired. In other

words, in so far as challenge to the seniority of these respondents is concerned, the petitioner really can have no grievance. The petitioner, had earlier filed Writ Petition No. 1865 of 2002 about fixation of inter-se seniority. This court directed that the petitioner be heard by the Education Inspector. That was done and by communication of 01.12.2003 the petitioner seniority in terms of Rule 12, sub-rule "C" was directed to be fixed on the day she obtained B.Ed. qualification. Exh. A is in those terms. We do not find any illegality in the seniority list and consequently the relief to that extent cannot be granted.

3. The petitioner has also sought the following relief.

> "That the writ of mandamus or any other writ, order or direction be issued ordering and directing respondent No. 1 and 2 to remove the 9th respondent as Head Mistress and appoint the petitioner as the Head Mistress of the second respondent."

. The learned counsel for the petitioner points out to the reply filed on behalf of respondent Nos. 2 and 9. In Para 3 of the said affidavit in reply, it is set out that the said trust is a minority

institution and as a minority institution, the Respondent No. 1 is not obliged to appoint only the seniormost teacher as Head Mistress considering the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Act, 1977, hereinafter referred to as the "ACT". The respondent No. 2 is a secondary school and not a primary school. The respondent No. 9 was appointed as Head Mistress with effect from 01.08.2003. The appointment has been approved by the letter of the Education Officer dated 03.03.2004 subject to the outcome of any order that may be passed in the writ petition. Admittedly, in the order of seniority the respondent No. 9 is at Sr. No. 13 having acquired B.Ed. qualification on 14.06.1993. Section 3 of the Act clearly contemplates that the provisions of the Act will not apply to the appointment of the Head of the minority school. In fact the Dy. Director of Education by letter dated 20th February, 2004 has noted that the appointment of respondent No. 9 is in terms of section 3(2) of the Act and has taken the same on record. It is submitted that there is no material to indicate that the school is a minority school and as such the seniority ought to have been followed.

. The petitioner by way of mandamus has prayed for a direction to appoint the petitioner as Head Mistress, after removing respondent No. 9 who has been appointed as Head Mistress. It is the case of the petitioner that she is senior to respondent No. 3 and in terms of the seniority list, the respondent No. 9 under any circumstances could not have been appointed as the Head Mistress bearing in mind the provisions of the Act. In appointing the head of the institution, respondent management has to follow the seniority list prepared under the Act as per the rules. Admittedly, the respondent No. 9 is not senior to the petitioner. It is not the case of the respondent Management that the petitioner was not fit for being appointed as Head Mistress.

4. A reply has been filed by respondent No. 9 dated 15th December, 2005. Subsequently a reply has also been filed by Keshub Nirmaldas Gurbaxani, the Joint Secretary and Trustee of the respondent No.1. We may gainfully refer to the affidavit of the Joint Secretary. In the affidavit in reply, it is set out as under. The respondent No. 1 was initially registered as a Society under Societies' Registration Act, 1860 on 26.04.1938 with the Registrar of Joint

Stock Companies for Sindh (now in Pakistan). The respondent No. 1 thereafter came to be registered with the Dy. Charity Commissioner (then) Greater Bombay on 25.08.1964 as a public trust. In the affidavit, the names of the trustees were set out and all the trustees are Sindhis to the affiant's personal knowledge. The Kamla High School was founded in the year 1908 at Hyderabad Sind (now in Pakistan) by Shri Pribhadas Advani. The school was there known as Navaknya Vidhyalaya. It was renamed as Kamala Girls' High School in the year 1942 and it is named after the affiant's mother. After partition, in or about 1948 the school was shifted to Bombay at Khar and named as Kamala High School. Ever since it is being administered and managed by Sind Brahma Sikhya Samelan, which has as its members only Sindhis. The constitution of the office bearers is set out in the affidavit. All member or trustees are Sindhis and Sindhis are a linguistic minority community in the State of Maharashtra as well as in India. Reliance is placed on the booklet, setting out the constitution of the samelan. It is pointed out that in the year 1983, the respondent No. 1 and 2 had filed a petition before this Court, being Writ Petition No. 2728 of 1983 against the Government of Maharashtra and others.

By the said Writ Petition, the petitioner sought exemption from the operation of certain rules under the Act, on the ground that they are minority institution and as these rules framed under the Act were not applicable. An interim order came to be passed on 12.04.1984 whereby stay was granted against the operation of certain provisions of the Act. The Association of Sindhis (linguistic) Minority Management of Recognized Educational Institutions in Maharashtra" & Ors. filed a Writ Petition being Writ Petition No. 1331 of 2004. In the list of schools, exhibited, the respondent No. 1 and 2 have been shown at Sr. No. 4. As the respondent No. 1 and 2 are minority institution by virtue of Section 3 of the Act, the provisions of the Act do not apply to the recruitment of the head of the minority school and of the persons not exceeding three who are employed in the school and whose names are notified by the Management to the Department. In terms of Section 3(2) of the Act, the respondents 1 and 2 have been notifying the names of respondent Nos. 2 and 3 other persons. At the meeting held at 16.04.1989, it was resolved to forward the names of Head Mistress and three other employees in terms of Section 3(2) of the Act. This was communicated to the Dy. Director

(Education), who issued letter 15.05.1989 exempting the four persons mentioned in the letter from the purview of the Act. Mrs. R.J. Awatramani, Head Mistress, expired on 25.05.1990 and Mrs. R.B. Shroff has been appointed as Head Mistress. In the list of three names, one name was sought to be added. By communication dated 10.05.1994 the Dy. Director requested the respondents to furnish some documents including the list of managing trustees and other requirements. All the trustees believe in the principles of Brahmo Samaj and their mother tongue is Sindhi and that the medium of instruction is English with subsidiary Sindhi. All the trustees and members of the Samelan without exception are Sindhis. The Dy. Director of Education granted exemption to the named persons from the purview of the provisions of MEPS Act. As the Head Mistress was due to retire on 22.10.1994, Ms. T.C. Advani was appointed and approval was sought from the Education Department. The Department granted approval by communication dated 10.11.1994. At the relevant time Ms. T.C. Advani was not the senior most teacher. By letter dated 11.02.2003 the name of respondent No. 9 was added as a person to be exempted from the purview of the Act. The exemption was granted. Considering that Ms. T.C.

Advani was to retire from 31.07.2003, the working committee met on 16.03.2003 and after considering the names of 18 teachers decided to recommend the name of respondent No. 9 for the post of Head Mistress. The General Body agreed to the decision of the working committee. The Dy. Director (Education) was informed of the decision who granted approval subject to final outcome of this petition. It is therefore pointed out that the respondent No. 2 has been functioning as a minority school uninterruptedly for over 50 years in Mumbai and is so recognized by the Education Department. It is therefore, set out that the petitioner can have no grievance against the respondents in the matter of appointment of respondent No. 9.

5. The petitioner has filed a re-joinder to the the affidavits of respondent Nos. 1 and 9. It has been pointed out from a reading of both the affidavits, it is not possible to know as to whether the first respondent is a religious or linguistic minority. No details have been given as to the aims and objects of the trust and as to which community the majority of the members of the trust belong; as also whether majority of the students belong to particular

community and what steps are taken to inculcate minority value by the first respondent. It is therefore set out merely because the Government has noted the communication sent by the petitioner by its resolution as being a minority institution is of no consequence. The rejoinder affidavit in reply of the respondent Management is similar.

6. The question then is whether respondent Nos. 1 & 2 have been able to establish that they are a minority, linguistic or religious and whether there is any material to support the minority status. The rules and regulations of the trust only set out that the Head of the High Schools run by the Samelan shall be those who either belong to Brahmo Samaj or are in active sympathy with its ideals. The appointment has to be by the Samelan and not by the working committee. No material has been placed before us to show that Brahmo Samaj has been recognized as a religious minority or required to be so recognized. The memorandum of association also does not give any indication as to whether the society is a linguistic or religious minority. It is in these circumstances, that we will have to consider the contentions urged on behalf of the petitioner and the replies of the

respondents. One factor in aid of respondent No. 1 & 2, is that from the year 1984 by filing Writ Petition No. 2728 of 1983 the respondent Nos. 1 and 2 have been asserting their status as linguistic minority institution and from 1989 approval to the appointment of the Head of the School is given as a linguistic minority institution. The respondent have been getting exemption for appointment of the Head as also three of their employees under Section 3 of the Act as a minority linguistic institution. The averments in the affidavit in reply of respondent Nos. 1 & 2 would show that initially all the trustees were Sindhis and presently also all the trustees are sindhis. It is pointed out that Sindhis are linguistic a minority. That cannot be denied nor has been denied. It is, therefore, clear that what the petitioner is claiming is to be a linguistic minority and not a religious minority. The respondent State from the year 1989 has been accepting the appointment of Head of respondent No. 1 on the basis of it as being a minority institution. On the other hand, the petitioner has been unable to produce any material to contend the appointment by the respondent Nos. 1 & 2 of respondent No. 9 was not as a linguistic minority. We may point out in **P.A. Inamdar V/s. State of**

Maharashtra and others (2005) 6 SCC 537, the Hon'ble Supreme Court quoted with approval the judgment in Kerala Education Bill. The relevant part of the paragraph reads as under :-

> "The object underlying Article 30(1) is to see the desire of minorities being fulfilled that their children should be brought up properly and efficiently and acquire eligibility for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering public services, educational institutions imparting higher instructions including general secular education. Thus the twin objects sought to be achieved by Article 30(1) in the interest of minorities are [i] to enable such minority to conserve its religion and language, and [ii] to give a thorough, good, general education to children belonging to such minority. So long as its institution retains its minority character by achieving and continuing to achieve the aforesaid two objects, the institution would remain a minority institution."

7. We may now refer to the provisions of The National Commission for Minority Educational Institutions Act, 2004 and The National Commission for Minority Educational Institutions (Amendment) Ordinance Rule, 2006. By the ordinance, certain definitions have been included like Section 2 (ca). That defines competent authority to be appointed by

the appropriate Government to grant no objection certificate for the establishment of any educational institution of the choice of the minority. It would be clear, therefore, that under the ordinance, an authority has been created which is designated as a competent authority which has to grant a no objection for the establishment of Educational Institution. The no objection is for determination as to which institution is a minority institution. It pre-supposses, therefore, that the competent authority before granting the application will have to consider whether applicant before it is either a religious or linguistic minority. The only debatable question which arises is whether the said definition will apply to an institution which has already been established and functioning. In our opinion, for the present, it is not necessary to decide the controversy considering the peculiar circumstances.

8. Shri Bapusaheb Arjun Sonawane, Dy. Education Inspector has filed an affidavit on behalf of the State. It is set out in affidavit that in order to acquire minority status, the institution has to make an application under Section 3(2) of the said Act and or to make an application as per the resolution dated

17.07.2002 issued by the Education Department. If the institution has already been granted minority status under Section 3(2) of the Act, then it is necessary to fill the form as required under the said G.R. The G.R. is dated 17th July, 2002. A part of the GR, translation of which is given to us reads as under :-

> "In order to obtain approval as minority educational institution, the mother (original/founding) institution should submit an application to the concerned Divisional Deputy Director of Education in the form prescribed in the enclosed proforma "A""

The various tests which are required to be satisfied before approval can be granted have been set out. It is also set out that if an institution is granted minority status by Government letter dated 29.09.2001, then they are not required to apply. All others can apply for a declaration before the said authority that they are a minority institution. It would thus be clear that there is a power and an authority to decide whether the institution is a minority institution or not. The petitioner has chosen not to amend the petition and to incorporate any additional challenge other than what was already prayed for.

9. In our opinion, therefore, considering the

order in Writ Petition No. 2728 of 1993 and the material produced, it was up to respondent Nos. 2 & 3 to consider the respondent Nos. 1 & 2 herein as a minority institution. The action of the respondent State in recognizing the respondent Nos. 1 and 2 as a minority school is only recognizing the factual position, that the School was established and is being administered by a minority community. See **C. Ammad V/s. Manager, Emjay High School & Ors. 1998 6 SC 674.** The appointment of respondent No. 9 shall be subject to the order of this Court in Writ Petition No. 2728 of 1983.

10. For the aforesaid reasons, we find no merit in this petition. Rule discharged. There shall be no order as to costs.

[F.I. REBELLO, J.]

[ANOOP V. MOHTA, J.]